



Sacramento
Superior and Municipal Courts



THOMAS M. CECIL
Judge

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WHEELABRATOR CLEAN WATER
SYSTEMS, INC., BIO GRO SYSTEMS
DIVISION,

Case No. 95CS00946

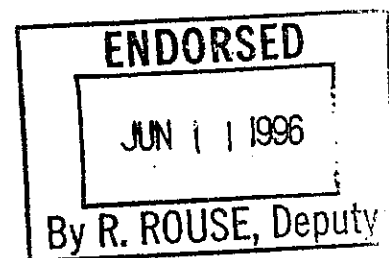
Plaintiff,

DECISION ON SUBMITTED
MATTER

VS.

DELTA PROTECTION COMMISSION,

Defendant



Petitioner's motion for the award of attorney's fees came on regularly for hearing in Department 22 of the Sacramento Superior and Municipal Courts on May 10, 1996, the Honorable Thomas M. Cecil presiding. Petitioner appeared through counsel, Mr. John E. Carne. Respondent appeared through counsel, Ms. Christine Sproul. The matter was argued and deemed submitted. Subsequently, the Court received a letter from Petitioner, clarifying a matter raised during oral argument. Respondent notified the court by phone that no additional comment would be forthcoming in response to the letter. In order to consider the contents of the letter of May 20, 1996, the submission was vacated, the letter reviewed, and the matter again deemed submitted on May 21, 1996.

Petitioner has requested attorney fees pursuant to section 1021.5 CCP. In pertinent part, that section authorizes the award of attorney fees in an action resulting in the enforcement of "an important right affecting the public interest" if:

- (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons,

(b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and

(c) such fees should not in the interest of justice be paid out of the recovery, if any

An award of attorney fees under this private attorney general statute constitutes an exception to the general rule that parties bear their own costs absent express agreement to the contrary or statutory authority supporting an award of attorney fees. An award may be made only if all of the elements of section 1021.5 are satisfied.

The Court is satisfied that compliance with the APA is a matter of importance and of high public interest. The APA was established to avoid the very excesses exemplified by the actions of government in this case. With this threshold element satisfied, the Court has examined the remaining provisions of section 1021.5.

The first prong of section 1021.5 requires an evaluation as to whether a significant benefit has been conferred on the general public or a large class of persons. The public at large is served by requiring compliance with the APA in the promulgation of rules governing the activities of businesses and individuals. It appears reasonable to conclude that this Court's clarification of the rules governing the application of biosolids to sensitive lands may well serve the interests of many people in California. An increased sensitivity to the letter of the law, and not just the spirit, is a matter of significant value. An adherence to the law may well promote more vigorous debate on matters of public importance and result in a more thorough and critical examination of the salient issues. Apparently, such an inquiry is now underway relative to P-3 in the light of this Court's ruling.

The Court is not persuaded by the arguments of Respondent that the value of this litigation is limited to the owners of 5,000 acres of Delta property. In the light of the uncontroverted declarations submitted by Petitioner relative to the interest generated in the rulemaking process, it seems readily apparent that it's not just the landowners that are interested in the proposed rule. Moreover, it appears premature, speculative and cavalier to

brand the current APA effort as having simply a “net effect” of delaying the implementation of P-3 (See Respondent’s Opposition, page 4).

While the Court declines to state that all actions alleging a failure to comply with the APA rise to the level of protecting a “significant” right, the Court finds the instant action to have done so. In some respects, this analysis follows that of the court in Beach Colony II v. California Coastal Commission (1985) 166 Cal.App.3d 106, a matter involving a potentially large array of landowners who might find themselves similarly situated.

The second prong of section 1021.5 relates to the financial stake of the Petitioner. In the recent case of Satrap v. Pacific Gas & Electric (1996) 42 Cal.App.4th 72 at 76, the Court stated:

The purpose of an award of attorney fees pursuant to section 1021.5, is to encourage suits that enforce ‘common interests of significant societal importance, but which do not involve any individual’s financial interest to the extent necessary to encourage private litigation to enforce the right. [Citation.]’ To encourage such suits, attorneys fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action. [Citation.] Section 1021.5 was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest.’ [Emphasis in original.]

As noted in Beach Colony II, the party requesting the award of attorney fees bears the burden of proof that its litigation costs “transcend its personal interest.” *Supra* at 113. See also Luck v. So. Pacific Transportation Co. (1990) 218 Cal.App.3d 1. The record before this Court is devoid of evidence on this point. Aside from the statement made by Petitioner’s counsel during argument relative to the gross receipts of the parent company, Petitioner has produced no probative evidence from which this Court might glean the “burden” of this litigation. While litigation cost figures have been produced by Petitioner, relative cost to this particular party is what counts. To determine the “burden” imposed upon Petitioner by this litigation, evidence limited to the dollar costs of pursuing the litigation is insufficient. As in Beach Colony II, “the litigation here was self-serving, and Colony II does not show why its victory does not justify the cost of winning it.” *Supra* at 115.

From the evidence produced, the Court cannot find that the financial burden of bringing this litigation outweighs the objective financial incentives for prosecuting this litigation. Having failed to meet its burden of proof, the Court is clearly empowered to deny awarding attorney fees. Feminist Women's Health Center v. Blythe (1995) 32 Cal.App.4th 1641, 1666; Schmid v. Lovette (1984) 154 Cal.App.3d 466, 477.

The Court disagrees with Petitioner's assertion that no ascertainable benefit to Petitioner has resulted from the litigation. The benefit, if any, needs to be evaluated at the time of the litigation. The determination is not postponed indefinitely, awaiting the culmination of the rulemaking process. Absent the relief provided by the instant litigation, Petitioner's business activities and opportunities would have been negatively impacted. That is clear from the declarations submitted by Petitioner in support of the Writ of Mandate. As a result of the litigation, no bar exists to Petitioner conducting business "as usual." While the Petitioner is allegedly holding back on the application of biosolids in the Delta (except as noted in the letter filed by Petitioner), that does not alter the benefits of the litigation. In short, Petitioner's business climate could only improve as a result of the litigation. The expected recovery is the proper test, because section 1021.5 is intended to provide an incentive for private plaintiffs to bring public interest suits when their personal stake in the outcome is insufficient to warrant incurring the costs of the litigation.

For the foregoing reasons, Petitioner's request for attorney fees is denied. Respondent is directed to prepare an appropriate order, seek approval as to form from Petitioner and submit it to this Court for signature.

Dated: 6/1/96



By: _____

Thomas M. Cecil
Judge of the Superior Court